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In the Supreme Court of the United States

ANKER ENERGY CORPORATION and
KING KNOB COAL CO., INC.,
Petitioners

v.

UNITED MINE WORKERS OF AMERICA
COMBINED BENEFIT FUND, *et al.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS UMWA COMBINED BENEFIT FUND AND ITS TRUSTEES

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QUESTION PRESENTED

Beginning in 1974, the National Bituminous Coal Wage Agreements ("NBCWAs") explicitly referred to lifetime health coverage for retired coal miners and their dependents. The question presented in this case is whether the court of appeals correctly concluded that the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq.*, does not violate the Due Process or Takings Clause of the Fifth Amendment as applied to Anker Energy Corporation, a coal company that, through its related person, King Knob Coal Co, Inc., voluntarily agreed to and signed the NBCWAs of 1974, 1978, 1981, and 1984.

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BRIEF IN OPPOSITION FOR RESPONDENTS UMWA COMBINED BENEFIT FUND AND ITS TRUSTEES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a- 40a) is reported at 177 F.3d 161 (3d Cir. 1999). The opinions of the district court (Pet. App. 41a-50a and Pet. App. 51a-73a) are unreported.

STATUTE INVOLVED

This case concerns the constitutionality of the Coal Industry Retiree Health Benefit Act of 1992, 26 U.S.C. §§ 9701 *et seq.* and 30 U.S.C. § 1232(h) (the "Coal Act"), which was

enacted as Title XIX, Subtitle C, of the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, 3036-56. The petition does not reproduce the statute in full. Among other things, it omits the prefatory provisions of the Coal Act that set forth Congress' findings and declaration of policy. The remainder of the statute is reproduced as an appendix to the brief in opposition filed by these respondents in *Unity Real Estate Company v. Hudson*, No. 99-12, another case in which petitioners chose to reproduce only selected portions of the statute.

STATEMENT OF THE CASE

In *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), a divided Court held one provision of the Coal Act unconstitutional as applied to the specific circumstances of the petitioner in that case. The plurality and concurring opinions in *Eastern* ruled that Section 9706(a)(3) of the statute, 26 U.S.C. § 9706(a)(3), is unconstitutional as applied to a company that left the coal business in 1965, and thus did not sign a 1974 or later National Bituminous Coal Wage Agreement ("NBCWA"), which referred expressly to lifetime health benefits for coal industry retirees and their dependents. In sharp contrast to Eastern, petitioner Anker Energy Corporation ("Anker") did not leave the coal industry in 1965, but remained in the industry and, through its related person, King Knob Coal Co., Inc. ("King Knob"), signed the NBCWAs of 1974, 1978, 1981, and 1984, each of which helped to foster an expectation of lifetime retiree health coverage. Petitioners are thus readily distinguishable from Eastern.

Contrary to petitioners' characterization, they seek not to apply *Eastern* properly, but rather to abolish the entire statutory health care system established by Congress in the Coal

Act. Through that statute, Congress sought to remedy a funding crisis in the preexisting contractual multiemployer health care plans. Recognizing the inability of collective bargaining to deal with employers that had contributed to the creation of the problem but that were no longer mining coal or participating in the collective bargaining process, Congress sought by statute to spread liability broadly among various responsible parties.

Following the decision in *Eastern*, the Commissioner of Social Security notified several dozen operators that were similarly situated to Eastern (in that none of them and none of their related persons had signed a 1974 or later NBCWA) that their Combined Fund beneficiary assignments were void in light of *Eastern*, and that no further payment would be required of them under the Coal Act. Petitioners, not fitting that description, received no such notice.

If petitioners' arguments here were accepted, coal operators that signed 1974 and later NBCWAs would no longer be required to provide health benefits to nearly 70,000 retired miners and their dependents, and the Coal Act would be totally dismantled. Petitioners' all-out assault on Congress' decision in the Coal Act to impose liability on those entities, such as Anker and King Knob, that signed collective bargaining agreements that explicitly referred to health coverage for life, benefitted from the multiemployer health care system, and then abandoned their retirees and dependents in the multiemployer funds is not supported by *Eastern* or by any decision before or after this Court's ruling.

A. History and Structure Of The Coal Act

The several opinions in *Eastern* addressed at some length the historical background of the Coal Act.[1] We summarize only those aspects of that background that are relevant here.

1. *History Of The Coal Act*

a. *National Bituminous Coal Wage Agreements*

Since 1946, retiree health benefits in the coal industry have been provided through a series of multiemployer health plans established in collective bargaining. From 1950 through 1974, health benefits (and pension benefits as well) were provided through a single multiemployer plan known as the UMWA 1950 Welfare and Retirement Fund ("1950 W&R Fund"). Following the enactment of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et*

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[1]Numerous court of appeals decisions, both before and after *Eastern*, have addressed the same history. *See, e.g.*, *Unity Real Estate Co. v. Hudson*, 178 F.3d 649 (3d Cir. 1999), *cert. pending*, No. 99-12 (filed June 28, 1999); *Association of Bituminous Contractors, Inc. v. Apfel*, 156 F.3d 1246 (D.C. Cir. 1998) *("ABC")*; *Davon Inc. v. Shalala*, 75 F.3d 1114 (7th Cir.), *cert. denied*, 519 U.S. 808 (1996); *In re Blue Diamond Coal, Co. (Blue Diamond Coal Co. v. Shalala)*, 79 F.3d 516 (6th Cir. 1996), *cert. denied*, 519 U.S. 1055 (1997); *Holland v. Keenan Trucking Co.*, 102 F.3d 786 (4th Cir. 1996); *In re Chateaugay Corp. (LTV Steel Co. v. Shalala)*, 53 F.3d 478 (2d Cir.), *cert. denied*, 516 U.S. 913 (1995).

seq. the collective bargaining parties, the United Mine Workers of America ("UMWA") and the Bituminous Coal Operators' Association, Inc. ("BCOA"), divided the 1950 W&R Fund into four separate plans. This was accomplished in the 1974 NBCWA. Pet. App. 5a. *See also Eastern*, 524 U.S. at 509 (plurality).

Two of the four new plans, the UMWA 1950 Benefit Plan and the UMWA 1974 Benefit Plan, provided health benefits, and the other two provided pension benefits. The 1974 NBCWA explicitly contemplated that miners and their dependents would be provided health benefits through the UMWA Plans "for life." Pet. App. 6a; *see also Eastern*, 524 U.S. at 509-10 (plurality); *Unity*, 178 F.3d at 653. The 1974 NBCWA in fact contains thirteen separate references to the retention of health services cards "for life" or "until death." *Unity*, 178 F.3d at 665. Subsequent NBCWAs, including the NBCWAs of 1978, 1981, and 1984, contain similar repeated references to the retention of health services cards "for life" or "until death" or to an "entitle[ment] to receive health benefits until death." *Id.* at 666-68.

In 1978, the UMWA and BCOA restructured the industry's contractual health care system to address employer concerns that the multiemployer approach was unraveling as fewer companies elected to participate in the multiemployer plans and an increasing burden was placed on a shrinking base of signatory operators. First, for miners leaving covered service in the coal industry on or after January 1, 1976, the primary responsibility for retiree health coverage was shifted from the UMWA multiemployer system to the individual coal company that employed the miner in question. The 1974 Benefit Plan was retained as an "orphan" plan through which benefits would be provided to retirees whose former employer had gone out of

business. Pet. App. 6a. Second, the employers signing the 1978 and later NBCWAs agreed to the "guarantee clause" that obligated signatory employers to make contributions sufficient to maintain the contractually specified benefits throughout the term of the agreement. Third, the employers that signed the 1978 and later NBCWAs also agreed to the so-called "evergreen clause." Under the evergreen clause, all of the signatory employers agreed that they would continue to contribute to the collectively bargained plans for as long as subsequent NBCWAs required such contributions, even if a particular employer did not sign such subsequent NBCWAs. Pet. App. 6a. These contractual features were perpetuated in subsequent collective bargaining agreements, *i.e.*, the NBCWAs of 1981, 1984, and 1988.

b. *The Crisis That Threatened The Multiemployer Plans And Their Beneficiaries, And The Efforts To Resolve It*

As health care costs increased, coal operators began exiting the coal industry and "dumping" their retirees into the UMWA Plans, where their benefits would be funded by the remaining signatory operators. As the number of coal operators contributing to the UMWA Plans decreased, fewer and fewer operators were left to carry the burden of rapidly rising health care costs, not only for their own retirees but also for thousands of retirees with whom none of the remaining contributing operators had ever had any employment relationship. Pet. App. 6a; *see also Eastern*, 524 U.S. at 511 (plurality).

In 1989, as the situation worsened, the UMWA engaged in a ten-month labor dispute against the Pittston Coal Company, which was resolved only after Secretary of Labor Dole

intervened and appointed a mediator. The eventual settlement provided, *inter alia*, for the creation of the Secretary of Labor's Advisory Commission on United Mine Workers of America Retiree Health Benefits (the "Coal Commission"), an industry-wide commission charged with the task of analyzing the retiree health care crisis and recommending solutions. *Eastern*, 524 U.S. at 511 (plurality).

The November 5, 1990 Coal Commission report explained that the collective bargaining process – limited as it was to companies still mining coal – was inadequate to provide a long-term solution. Accordingly, the Commission recommended that Congress enact legislation to address the problem. After two years of deliberations on the Coal Commission's report and recommendations, Congress enacted the Coal Act.

2. *The Structure Of The Coal Act*

In the Coal Act, Congress provided that eligible beneficiaries under the statute would receive health coverage either from their former employers' individual employer plans (the continuation of which the statute required) or from one of two new trust funds to be created in accordance with the statute. One of those funds, the United Mine Workers of America Combined Benefit Fund ("Combined Fund"), is at issue here.[2]

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[2]The Coal Act also created the 1992 UMWA Benefit Plan (the "1992 Plan"), an entirely new entity designed to provide benefits to eligible retirees who are not beneficiaries of the Combined Fund and who are not receiving health care coverage from their former employers. *See* 26 U.S.C. § 9712.

Under the Coal Act, the 1950 and 1974 UMWA Benefit Plans were merged into the Combined Fund as of February 1, 1993. 26 U.S.C. § 9702. The Combined Fund provides health and death benefits to coal industry retirees and their dependents who, as of July 20, 1992, were eligible to receive, and were receiving, benefits from the UMWA 1950 or 1974 Benefit Plans. *Id.* at § 9703(a), (b)(1), (e), (f).

The coal operators that voluntarily participated in the UMWA Plans pursuant to the terms of their collective bargaining agreements with the UMWA, including petitioners, are required to finance the benefits provided by the Combined Fund. Coal Act premiums are based on the number of Combined Fund beneficiaries that have been assigned to the operators by the Secretary of Health and Human Services (now, the Commissioner of Social Security) under Section 9706 of the Act.

B. Petitioners' Involvement In The Coal Industry, And The Assignment Of Coal Act Beneficiaries To Anker

Petitioners seek to minimize their extensive involvement in the coal industry by claiming that they never had any obligation to make, and never made, any contribution to the UMWA Plans. Such a representation is highly misleading.

Between 1967 and 1982, King Knob contracted with Consolidation Coal Company ("Consol") to mine coal on certain property owned by Consol. As part of these contracts, King Knob agreed that all of its employees would be members of the UMWA and that it would be signatory to the then current NBCWA. Pet. App. 9a-10a. To achieve this end, King Knob, rather than joining the BCOA, elected to sign "me-too"

agreements during the 1970's and 1980's, the last in 1984.[3] Pet. App. 10a. As a result, King Knob was signatory to the 1971, 1974, 1978, 1981, and 1984 NBCWAs and was thereby obligated to contribute to the UMWA multiemployer health plans.

In 1975, an affiliate of Anker acquired King Knob. The Anker affiliate continued King Knob's relationship with Consol and with the UMWA Plans until Consol terminated the relationship in 1982. Thereafter, Anker and Consol entered into a settlement of Anker's claims arising from the termination of the relationship. As part of the settlement, Consol agreed to "reimburse King Knob for all subsequent payments due to the UMWA Fund or any successor fund attributable to" either the coal produced under the contracts between Consol and King Knob or the hours worked under those contracts." Pet. App.10a.

Anker ceased coal mining operations in November 1987 and dumped its retirees in the 1974 Plan. These Anker retirees and their dependents then received health care coverage from the 1974 Plan even though Anker was no longer contributing to the UMWA Plans.[4]

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[3]King Knob last signed a "me-too" agreement pursuant to its contract with Consol in 1981. As counsel for petitioners acknowledged at oral argument before the court of appeals, however, petitioners (or at least one of them) signed the 1984 NBCWA and contributed to the UMWA multiemployer plans until at least1987.

[4]Like the courts below, we sometimes use the term "Anker" to refer to petitioners collectively.

Under the Coal Act, the Secretary assigned liability for 244 Combined Fund beneficiaries to Anker based on Anker's status as a related person to King Knob, effective February 1, 1993, the day on which the Combined Fund began providing health coverage under the statute. Mortality has since reduced this number.

C. Proceedings In The Courts Below

Anker and King Knob filed a complaint against the Commissioner of Social Security and the Trustees of the Combined Fund seeking a declaration that the Commissioner's assignment of beneficiaries to Anker violates the Due Process and Takings Clauses of the Fifth Amendment. Additionally, Anker sued Consol for breach of contract claiming that under the terms of their settlement agreement between Anker and Consol, Consol was liable for any premiums due the Combined Fund.

In July 1997, the district court granted Consol's motion for judgment on the pleadings on Counts I and II of Anker's Complaint, which sought to hold Consol liable under the Coal Act. In May 1998, after briefing, the court upheld the constitutionality of the Coal Act and granted summary judgment in favor of the Combined Fund, its Trustees, and the Commissioner. Finally, in July 1998, the district court granted summary judgment on the Combined Fund's counterclaim for entry of judgment against Anker for unpaid premiums, interest, liquidated damages, attorneys' fees, and costs. Anker then appealed.

The court of appeals heard argument on March 25, 1999. At that time, another case involving application of *Eastern* to post-1974 NBCWA signatories was pending before

a separate panel of the court of appeals. *See Unity Real Estate v. Hudson*, 178 F.3d 649 (3d Cir. 1999), *cert. pending* No. 99-12 (filed June 28, 1999). Briefing and argument in that case had been completed several months earlier. Four days after argument in *Anker*, the court of appeals issued its decision in *Unity*, upholding the constitutionality of the Coal Act. Among other things, the *Unity* court determined that "[b]ecause the plaintiffs signed NBCWAs in 1974 and thereafter, they are factually distinguishable from Eastern Enterprises. Language in the plurality and concurrence suggesting that expectations fundamentally changed after 1974 supports our conclusion." *Unity*, 178 F.3d at 659.

On April 1, 1999, the *Anker* court directed the parties to file letter memoranda discussing the effect, if any, of the Court's decision in *Unity* on *Anker*. After receiving those memoranda, the court issued its decision, following the earlier ruling in *Unity* and sustaining the constitutionality of the Act as applied to Anker.[5]

The court of appeals held that *Eastern* is distinguishable on its facts and does not support Anker's position. Relying on both the plurality and concurring opinions in *Eastern* (*see* 524 U.S. at 509, 530, 536 (plurality); 550 (Kennedy, J., concurring in the judgment and dissenting in part)), the court ruled that *Eastern* is distinguishable because, whereas Eastern did not sign a 1974 or later NBCWA, Anker, through its statutory related person, King Knob, signed the 1974, 1978, 1981, and 1984 NBCWAs. In the court's words, "analysis of the decisions in

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[5]The court of appeals also reversed the district court's decision granting Consol judgment on the pleadings and remanded the case for further proceedings.

Eastern Enterprises leads us to the conclusion that a majority of the Court would find the Act unconstitutional when applied to an employer that did not agree to the 1974 or subsequent NBCWAs, while application of the Act to a signatory to the 1974 or a subsequent wage agreement would be an entirely different matter." Pet. App. 21a. Thus, the court held that "this case falls outside the specific holding of *Eastern Enterprises*, and . . . [that] the Coal Act's application to Anker [is] constitutional." Pet. App. 22a.

With respect to the merits of Anker's constitutional claims, the court ruled that it, like the courts of appeals in *Unity* and *ABC*, was "bound to follow the five-four vote against the takings claim . . . ." Pet. App. 37a-38a. Thus, the court devoted the bulk of its discussion to Anker's argument that the Coal Act, as applied to it, is impermissibly retroactive under the so-called substantive component of the Due Process Clause. Pet. App. 22a-25a.

The court began its review of Anker's claims by reiterating its holding in *Unity* that "the proper standard of review for a due process analysis is whether Congress's action was arbitrary or irrational." Pet. App. 22a. Quoting the opinion in *Unity* (178 F.3d at 671), the court stated that "where Congress acts reasonably to redress an injury caused or to enforce an expectation created by a party, it can do so retroactively." *Id.* at 23a. The court also relied on its conclusion in *Unity* that "Congress's determination that the coal industry acted in a way that created the miners' reasonable expectation of lifetime benefits, and . . . its finding that the coal companies were the most responsible parties for the deterioration of the Benefit Plans were 'reasonable evaluations of the problem.'" *Id.* at 22a. Finding that Anker bears the same responsibility as Unity "for creating the reasonable expectations

and the problem of under-funding that the Coal Act redresses" (Pet. App. 24a), the court of appeals ruled that the statute does not violate due process principles as applied to Anker.

ARGUMENT

The court of appeals decision is correct and further review is not warranted. The decision is fully consistent with this Court's ruling in *Eastern* and accurately reflects the limited nature of that ruling. The court applied the well-established legal standard governing substantive due process challenges to economic legislation, and it did so with proper regard for the retroactive aspect of the statute at issue.

In sustaining the validity of the Coal Act as applied to post-1974 NBCWA signatories, the court of appeals reached the same result as the D.C. Circuit, the first post-*Eastern* court to address the constitutionality of the statute as applied to such employers. *ABC*, 156 F.3d at 1253-58. *See also Holland v. Big River Minerals Corp.*, 181 F.3d 597, 606 (4th Cir. 1999) ("the considerations bearing upon whether Congress acted rationally in imposing retroactive liability on the NBCWA signatory in Eastern Enterprises are different than those relating to the rationality of imposing liability on members of a control group of a 1978 or subsequent benefit plan signatory"); *Holland v. Robert Coal*, 172 F.3d 919, 1998 WL 794832 (D.C. Cir. 1998), *cert. denied*, 119 S. Ct. 1803 (1999). There is no conflict among the circuits.

If Anker's argument were accepted, the entire congressional scheme for protecting retiree health benefits in

the coal industry would be defeated.[6] *Every* signatory employer (including signatories to the 1988 NBCWA, the collective bargaining agreement in effect when the Coal Act was passed) could make the same argument as Anker, namely, that the contribution obligations to which it agreed by contract were limited to the terms of the contracts they signed and that therefore Congress' effort to impose a new statutory obligation covering the period *after* the term of those agreements is invalid. As the court of appeals correctly recognized, such an outcome would be irreconcilable not only with several decisions upholding the Coal Act after *Eastern* but also with the reasoning of the plurality and the concurrence in *Eastern* itself and with this Court's own precedents establishing that the legislative authority of Congress is not confined by the terms of private contracts. *See, e.g., Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223-24 (1986); *Norman v. Baltimore & Ohio R.R.*, 294 U.S. 240, 307-07 (1935).

A. The Court of Appeals' Decision Does Not Conflict With *Eastern*

Anker's argument that the court of appeals improperly refused to follow *Eastern* is incorrect. First, the "retroactivity analysis" that Anker attempts to derive from the plurality and concurring opinions in *Eastern* does not represent the holding of the Court and does not have some independent constitutional status apart from the two separate Fifth Amendment provisions on which the Members of the Court who voted in favor of *Eastern* relied. Second, Anker which, through its related

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[6]Anker itself acknowledges that the vast majority of companies subject to the Coal Act are post-1974 NBCWA signatories. Pet. 21.

person, King Knob, signed the 1974, 1978, 1981, and 1984 NBCWAs, is not similarly situated to Eastern, which left the coal industry in 1965 and did not sign an NBCWA after 1964. Third, Anker's argument that it never had a contractual obligation to make payments to the UMWA multiemployer health care system is simply untrue. Fourth, the court of appeals properly rejected Anker's claims of unconstitutional "retroactivity."

1. *Anker Misstates The Holding Of Eastern*

Anker contends that the plurality and Justice Kennedy relied "upon similar reasoning" in assessing the constitutionality of the Coal Act. Pet. 10. Specifically, it claims that those five Justices agreed that "retroactive employee benefits legislation is unconstitutional if it imposes a substantial economic burden on employers which is based on conduct 'far in the past' that is 'unrelated to any commitment that the employers made or to any injury they caused.'" *Id.* at 17. Applying this alleged "similar reasoning" to itself, Anker concludes that the Coal Act is unconstitutional as applied to it. *Id.* This reasoning is faulty for several reasons.

To begin with, contrary to Anker's claims, the plurality and the concurrence reached their respective opinions based on very different constitutional reasoning. Applying "the three factors that traditionally have informed our regulatory takings analysis," the plurality concluded that the Coal Act violated the Takings Clause as applied to Eastern. 524 U.S. at 529 (plurality). Justice Kennedy affirmatively rejected the plurality's reliance on the Takings Clause but decided that the Coal Act as applied to Eastern violated "accepted principles" of this Court's due process jurisprudence. *Id.* at 549 (Kennedy, J., concurring in the judgment and dissenting in part). The

plurality declined to reach the due process question and acknowledged that the Court "has expressed concerns about using the Due Process Clause to invalidate economic legislation." *Id.* at 537 (plurality).

Anker ignores the disagreement between the plurality and concurring opinions and declares that the plurality and Justice Kennedy employed "a virtually identical retroactivity analysis." Pet. 18. Anker further avoids any argument addressed to either the Takings Clause or the Due Process Clause and amalgamates the two distinct concepts by asserting that its "analysis" demonstrates that the Coal Act is in some generalized way "unconstitutional" as applied. *Id.*

But this is not the way courts determine the constitutionality of statutes. The "retroactivity analysis" that Anker purports to extract from the plurality and concurring opinions in *Eastern* has no independent constitutional status; there is no right, for example, to be free from retroactive statutes or from the imposition of "substantial" liability. For this very reason, the D.C. Circuit in *ABC* rejected the claim that *Eastern* requires that the Coal Act be held generally "unconstitutional" on the basis of this extra-constitutional "analysis":

> We begin our analysis with a bedrock principle of constitutional adjudication. . . . The Constitution prohibits certain governmental action through specific clauses. . . . Courts do not adjudicate generalized claims of unconstitutionality, but rather resolve constitutional questions by applying these settled doctrines to specific constitutional claims asserted under specific constitutional clauses. .

> . . We certainly will not apply a takings analysis to resolve a due process challenge or engage in a free-wheeling, non-textual examination of the "constitutionality" of the Coal Act.

ABC, 156 F.3d at 1253-54.

By failing to demonstrate – or even to argue – that the Coal Act violates their rights under either the Due Process Clause or the Takings Clause, Anker attempts to elevate its purported "retroactivity analysis" to constitutional status and to obscure the "bedrock principle" that laws are unconstitutional only if they violate a specific clause of the Constitution. Anker's peculiar approach has been properly rejected by both courts of appeals that have decided post-*Eastern* challenges to the Coal Act, and it does not warrant review here.

2. *Anker Is Not Similarly Situated to Eastern*

Even if Anker had properly presented claims under the Due Process Clause or the Takings Clause rather than its generalized claim of "unconstitutionality," *Eastern* would not support Anker's position. The lynchpin of the plurality and concurring opinions in *Eastern* was that Eastern had left the coal industry in 1965 and had not signed an NBCWA since 1964. 524 U.S. 514-16 (plurality), 550 (Kennedy, J., concurring in the judgment and dissenting in part). Anker, by contrast, actively mined coal until at least 1984, and signed the 1974, 1978, 1981, and 1984 NBCWAs.

Whatever their differences with respect to the pre-1974 NBCWAs, all of the Justices in *Eastern* agreed that the 1974 and subsequent NBCWAs expressly referred to lifetime health benefits. The plurality stated, for example, that "[t]he 1974

NBCWA . . . amend[ed] previous medical benefits to provide a Health Services card for retired miners until their death, and to their widows until their death or remarriage." 524 U.S. 509. Similarly, the plurality distinguished the NBCWAs that Eastern had signed from those that came later:

> [W]hile Eastern contributed to the 1947 and 1950 W&R Funds, it ceased its coal mining operations in 1965 and neither participated in negotiations nor agreed to make contributions in connection with the Benefit Plans under the 1974, 1978, or subsequent NBCWA's. *It is the latter agreements that first suggest an industry commitment to the funding of lifetime health benefits for both retirees and their family members.*

Id. at 530 (emphasis added); *see also id.* at 536 ("There is no doubt that many coal miners sacrificed their health on behalf of this country's industrial development, *and we do not dispute that some members of the industry promised lifetime medical benefits to miners and their dependents during the 1970's*") (emphasis added).

Justice Kennedy likewise concluded that Eastern

> was not responsible for [the beneficiaries'] expectation of lifetime health benefits. . . . As the plurality opinion discusses in detail, the expectation *was created by promises and agreements made long after Eastern left the coal business.*

Id. at 550 (emphasis added). The four dissenting Justices in

Eastern took the view that, while implicit promises were made, and legitimate expectations created, long before the 1974 NBCWA, those commitments were made explicit in the 1974 and later NBCWAs. *Id.* at 553 (Stevens, J., dissenting) ("their implicit agreement was made explicit in 1974").

The common theme among the various opinions in *Eastern* is that the 1974, 1978, and subsequent NBCWAs created in retired coal miners a reasonable expectation of lifetime health benefits. As stated by the D.C. Circuit in *ABC*, "[t]he clear implication of each opinion in *Eastern Enterprises* is that employer participation in the 1974 and 1978 agreements represents a sufficient amount of past conduct to justify the retroactive imposition of Coal Act liability (for the dissenting justices, of course, such participation is not even necessary)." 156 F.3d at 1257. Thus, Anker which, through King Knob, signed the 1974, 1978, 1981, and 1984 NBCWAs and thereby helped to foster an expectation of lifetime health coverage, cannot avoid its Coal Act liabilities by claiming that it is similarly situated to Eastern.

3. *Anker's Argument Is Based On A False Premise; It Was Always Responsible For The Health Care Benefits of Its Retirees And Congress' Legislative Authority Is Not Limited By Contractually Binding Promises*

Anker argues that it was never responsible for the payment of premiums or royalties to any of the UMWA Plans and that, in any event, the term of the obligation was limited to the duration of the contract. Pet. 19. For these reasons, Anker claims that the retroactive Coal Act liabilities imposed on it are "completely unrelated to any past conduct and is not related to

any commitment [it has] ever made." *Id.* This argument is fundamentally flawed for two reasons.

First, Anker's argument that it is like Eastern because it too was not obligated to make any contributions to the UMWA Benefit Funds is simply untrue. The NBCWAs King Knob signed throughout the 1970's and 1980's contained provisions requiring contributions to the 1950 and 1974 Benefit Plans. That King Knob had a separate agreement with Consol under which Consol agreed to make the required contributions to the UMWA Benefit Plans did not relieve King Knob of its underlying obligation to these Plans under its contracts with the UMWA. Indeed, it was King Knob, and not Consol, that employed the miners in question. Thus, unlike Eastern, Anker, through its related person, King Knob, agreed to be bound to the 1974, 1978, 1981, and 1984 NBCWAs (all of which included provisions referring explicitly to lifetime health benefits), employed miners who worked under these agreements, and agreed to contribute to the UMWA Benefit Plans on behalf of these employees.[7] As the appellate court emphasized, "King Knob's ability to have Consol assume this obligation is simply irrelevant to the fact that by agreeing to the NBCWAs King Knob was a party to the agreements that created the miners' expectation of lifetime benefits." Pet. App. 24a. Consequently, even in the view of the five Justices who

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[7]Anker's argument is particularly disingenuous in light of the fact that even after its relationship with Consol terminated in 1982, it, and or King Knob, signed the 1984 NBCWA and contributed to the UMWA Plans until at least 1987.

voted in favor of Eastern, Anker, through King Knob,[8] contributed to the miners' expectation of lifetime benefits. *Eastern*, 524 U.S. at 535 (plurality opinion)("Not until 1974 . . . could lifetime medical benefits under the multiemployer agreement have been viewed as promised."); id. at 550 (Kennedy, J., concurring in the judgment and dissenting in part)("As the plurality opinion discusses in detail, the expectation [of lifetime benefits] was created by promises and agreements made long after Eastern left the coal business.").[9]

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[8]Anker does not contest that it is a "related person" to King Knob under Section 9701(c)(2) of the Coal Act. Pet. App. 28a.

[9]The court of appeals also properly rejected Anker's argument that it is like Eastern because it was never a member of the BCOA and it did not participate directly in the NBCWA negotiations. Indeed, the court held that "[t]he difference between a member of the BCOA and a 'me-too' signatory to a NBCWA is of no consequence to this case despite Anker's contrary assertions." Pet. App. 38a (*citing Connors v. Link Coal Co.*, 970 F.2d 902, 903 (D.C. Cir. 1992)("'Me-too' agreements have terms identical to the terms of the national agreement, and thus there is no distinction among them concerning employers' contractual rights and obligations."); *Arizona Laborers, Teamsters and Cement Masons Trust Fund v. Conquer Cartage Co.*, 753 F.2d 1512, 1518 (9th Cir. 1985)(defining a "me-too" agreement as an agreement by which a smaller employer can obtain all of the benefits of the master collective bargaining agreement without joining the industry association and incurring the costs of participating in industry negotiations or negotiating independently with the union). The court further stated that while the court of appeals in *Unity*

Second, Congress, in exercising its legislative power, is not fettered by the terms of private contracts. *See Connolly*, 475 U.S. at 223-24 ("Contracts, however express, cannot fetter the constitutional authority of Congress") (*quoting Norman*, 294 U.S. at 307-08). Indeed, if there were a requirement that legislation merely track contractual promises, there would be little impetus to enact legislation. As the court of appeals in *Unity* recognized, "[t]he *Eastern* plurality did not reject the *Connolly* principle that government may do more than require private parties to live up to their contracts." 178 F.3d at 672.

The rationality of Congress' decision to provide for the stable financing of health care benefits for coal industry retirees does not depend on a finding of a contractually binding "promise" or "commitment," however those words may be defined. The legislative purpose is a legitimate governmental objective that Congress is authorized to pursue in the exercise of its Article I powers. Thus, the only question is whether Congress has acted rationally and non-arbitrarily in imposing liability on the very employers that created, participated in, and benefitted from the UMWA multiemployer health care system, that signed collective bargaining agreements that explicitly referred to health coverage for life, and that formerly employed retirees who were continuing to receive benefits from the multiemployer system at the time that Congress acted. As summarized by the court of appeals in *Unity*, "we think that

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referred to the employers' membership in BCOA, it would "not read this language to allow 'me-too' signatories to avoid the application of the Act." Pet. App. 24a.

explicit promises are not necessary in order to justify congressional action. The question is what reasonable expectations the coal companies' actions created." 178 F.3d at 664.

The NBCWAs signed by Anker in 1974, 1978, 1981, and 1984 referred repeatedly to health care coverage "for life" or "until death," even though the funding mechanism was tied to the term of each successive NBCWA. Like the court in *Unity*, the court of appeals here found that Anker, as a signatory to the 1978 and subsequent NBCWAs, bears responsibility "for creating the reasonable expectations and the problem of underfunding that the Coal Act redresses." Pet. App. 24a. Anker, argues, however, that each NBCWA it signed was limited to the term of that specific contract and that every NBCWA it signed had long since expired before enactment of the Coal Act. Pet. 19. As the *Unity* court correctly ruled, however, this argument goes "to the contract and not to the reasonable expectations that might have been created by the contract." *Id.* at 664. This conclusion is entirely consistent with the view expressed by all members of the Court in *Eastern* that the 1974 and subsequent NBCWAs expressly referred to the provision of lifetime health benefits. 524 U.S. at 509, 530, 536 (plurality), 550 (Kennedy, J., concurring in the judgment and dissenting in part), 553 (Stevens, J., dissenting).

4. *The Court Of Appeals Properly Rejected Anker's Claims of Unconstitutional "Retroactivity"*

Anker contends that, as applied to it, the Coal Act is impermissibly retroactive. This argument is defective in several respects.

First, although the point is undisputed, Anker nowhere acknowledges that the Coal Act provides benefits purely on a prospective basis and does not require funding for *any* health care received before the statute's enactment. To the extent the statue is retrospective at all, it is retrospective only in the sense that other federal statues, such as the Black Lung Benefits Act of 1972, 30 U.S.C. §§ 901 *et seq.*, and the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9601 *et seq.*, are also retrospective. In establishing the existence and extent of current and future liabilities, those laws look in part to events that occurred in the past. But, as the decisions sustaining the Black Lung Benefits Act and CERCLA show, *see Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976); *United States v. Monsanto Co.*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); *United States v. Northeastern Pharmaceutical and Chemical Co.*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987), that fact alone is insufficient to establish that such laws are invalid, even where the coal industry employment or polluting discharge in question occurred *decades* before the statutes' enactment.

Second, Anker exaggerates the extent of the Coal Act's "retroactivity." By focusing on the beginning rather than the end of the terms of the last coal industry collective bargaining agreements that they signed, petitioners assert that the Coal Act involves eight (rather than four) years of retroactivity. On this dubious reasoning, the statute would involve nearly five years of retroactivity even with respect to those operators that were NBCWA signatories at the time the Coal Act was passed. That is so because the then-current NBCWA was the 1988 NBCWA, the term of which began on February 1, 1988, well over four and a half years before the statute's enactment. This point

confirms that, unlike this Court's decision in *Eastern*, Anker seeks to destroy the entire Coal Act.

In any event, even using Anker's questionable arithmetic, the retroactivity of the Coal Act as applied to Anker does not remotely approach the degree of retroactivity that five Justices found offensive in *Eastern*. According to the plurality and concurring opinions, the employer in that case left the coal industry in 1965, more than 27 years before the Coal Act was passed. The court of appeals found the length of time since King Knob last agreed to an NBCWA was eight years, and that because the Third Circuit had found 11 years to be acceptable in *Unity*, the degree of retroactivity was not impermissible.

Perhaps most important, Anker's simplistic counting of years neglects altogether the close relationship among the liability imposed by the Coal Act, the collective bargaining agreements signed by Anker (with their frequent references to lifetime health care), Anker's own conduct in "dumping" its retirees into the contractual multiemployer plans (where for years they received benefits paid for entirely by other employers), and the legitimate governmental interests supporting the challenged legislation. In the *Unity* court's words, "[w]here Congress acts reasonably to redress an injury caused or to enforce an expectation created by a party, it can do so retroactively." 178 F.3d at 671.

B. The Court of Appeals Correctly Interpreted *Marks v. United States*, And Anker's Other Proposed Grounds For Review Are Insubstantial

Anker claims that the court of appeals' determination that *Eastern* is indistinguishable from this case raises an important and recurring issue about the way in which lower

federal courts should interpret and apply plurality decisions of this Court. Anker's critique of the court of appeals' application of this Court's decision in *Marks v. United States*, 430 U.S. 188, 193 (1977), is unjustified. *Marks* states that, where there is no opinion for the Court, the holding of a case may be viewed as "that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks*, 430 U.S. at 193 (internal quotation and citation omitted). But this approach is feasible only where "one opinion can be meaningfully regarded as 'narrower' than another – only when one opinion is a logical subset of other, broader opinions." *King v. Palmer*, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc), *cert. denied*, 505 U.S. 1229 (1992); *Rappa v. New Castle County*, 18 F.3d 1043, 1057-58 (3d Cir. 1994). Where the various opinions adopt distinct approaches and none can be said to be a subset of another, "no particular standard constitutes the law of the land, because no single approach can be said to have the support of a majority of the Court." *Rappa*, 18 F.3d at 1058; *see also King*, 950 F.2d at 782.

The court of appeals here correctly observed that "Justice Kennedy's substantive due process reasoning is not a 'narrower' ground that we might take to constitute the controlling holding." Pet. App. 17a (*quoting Unity*, 178 F.3d at 658). In such circumstances, "the only binding aspect of a splintered decision is its specific result . . . . " Pet. App. 17a. This conclusion is entirely consistent with the plurality and concurring opinions in *Eastern*. *See* 524 U.S. at 536-37 (plurality); *id.* at 550 (Kennedy, J., concurring in the judgment and dissenting in part).

In an attempt to avoid the plain holding of *Marks*, Anker claims that five Justices agree about the controlling legal principles, even though they disagree about what clause of the

Constitution controls. Pet. 22. This analysis cannot stand. As explained by the court of appeals in *Unity*,

> *There is fundamental conceptual difference between a takings claim and a substantive due process claims.* If the government pays just compensation, it may take property for public use under the Taking Clause. Due process protections, by contrast, define what the government may not require of a private party at all. It is the difference between a liability rule and a property rule.

Unity, 178 F.3d at 658 (emphasis added).

Contrary to Anker's claims, certiorari is not warranted so that the Court can "clarify *Eastern*" and "provide guidance to the federal courts concerning the proper legal precepts to apply in adjudging retroactive legislation." Pet. 24. The Court already grappled with these issues in *Eastern* and there is no basis for the Court to address them again now. Moreover, the principles espoused in *Marks* and cases interpreting it provide a proper framework for the interpretation of plurality decisions of this Court. There is no need for further doctrinal clarification.

Anker is also wrong in its characterization of the court of appeals' reference to the fact that five Justices in *Eastern* concluded that the Coal Act should not be reviewed under the Takings Clause. The court of appeals simply observed that only four Justices in *Eastern* accepted the plurality's takings analysis. Since that view did not command a majority in this Court, it does not bind lower federal courts. This unremarkable

conclusion does not conflict with *King*, 950 F.2d 771, and provides no basis for further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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